APPENDIX 1

IN THE UNITED STATES COURT OF
APPEALS
FOR THE FIFTH CIRCUIT

No 81-2156

DR. JACQUELINE S. HART,

Plaintiff-Appellant,

versus

THE UNIVERSITY OF TEXAS,
HOUSTON, M.D. ANDERSON
HOSPITAL and TUMOR INSTITUTE,
ET AL,

Defendants-Appellees.

Appeal from the United States District
Court for the Southern District of
Texas

(August 23 , 1982)

Before THORNBERRY, REAVLEY and GARWOOD,
Circuit Judges.
PER CURIAM:

This appeal is taken from a decision of the district court in favor of the

Univerisity of Texas, M.D. Anderson Hospital and Tumor Institute, its Board of Regents and various faculty members, Defendants-Appellees, in an action brought under Title VII of the Civil Rights Act of 1964 by Dr. Jacqueline Hart, Plaintiff-Appellant, a physician formerly employed by M.D. Anderson. Hart alleged that she was denied a promotion and was constructively discharged from her position as assistant professor of medicine because of her sex. She also claimed that the appellees converted a research program belonging to her, published portions of her work without giving her recognition, and slandered her character by giving false and malicious employment references subsequent to her departure from M.D. Anderson. Following a trial on the merits, the district court held that Hart failed to establish a prima facie case of sex discrimination. The court found that she was not

promoted because she lacked the requisite qualifications and that she was offered a one-year terminal contract because of her unsatisfactory work performance. It also held against Hart on the conversion and slander claims. We affirm.

Jacqueline Hart was hired by M.D. Anderson in 1966 as a fellow in the Department of Developmental Therapeutics. Initially her responsibilities at the hospital were in the area of patient care. Eventually she became involved in research and developed a research program of her own. As a result, in 1969 she was promoted to the rank of Assistant Professor. In 1975, 1976, and 1977 Hart sought to be promoted to the position of Associate Professor. Each time her department head, Dr. Emil Freireich, recommended her for the position to the appropriate review committees and each time the recommendation was rejected.

Following her last unsuccessful attempt at promotion, Hart's work performance at M.D. Anderson rapidly deteriorated. Consequently in July 1977 Dr. Freireich requested that Hart turn over her research program to Dr. Barthel Barlogie, a male physician and research fellow who had worked under Hart's supervision. Dr, Barlogie was promoted to assistant professor approximately one year after Hart's departure from M.D. Anderson and promoted to associate professor in 1980. In August 1977 Hart was offered a terminal one-year appointment in the form of a staff position as Assistant Internist at M.D. Anderson. She did not accept the position, which she considered a demotion, and ceased attending to her regular duties and responsibilities. In December 1977, she was advised by M.D. Anderson that her failure to accept the one-year position was being interpreted as a rejection.

The plaintiff in a Title VII case bears the burden of proving discrimination by a preponderance of the evidence. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981). To establish a prima facie case, the plaintiff must show "that she applied for an available position, for which she was qualified, but was rejected under circumstance which give rise to an inference of unlawful discrimination." Id. at ____, 101 S. Ct. 1094. If the plaintiff is successful in proving a prima facie case, the burden shifts to the defendant to produce evidence of some "legitimate, nondiscriminatory reason" for the employee's rejection. Id. at ____, 101 S.Ct. at 1094. The defendant need not convince the trier of fact but need only raise a genuine issue of material fact. Id. at ____, 101 S.Ct. at 1094. If the defendant meets this burden of production

then the case goes to the tirer of fact, and the plaintiff retains the "ultimate burden of persuading the court that she has been the victim of intentional discrimination." Id. at ____, 101 S.Ct. at 1095.

FAILURE TO PROMOTE

Hart testified that she applied for the position of associate professor, that despite her qualifications she was rejected, and that Dr. Barlogie, a male physician, similarly qualified, was later promoted to the position. She also claimed that her department head, Dr. Freireich, told her on more than one occasion that he could not support a woman over a man.

While Hart's qualifications appear impressive, she admitted that she had little or no experience in teaching at

the graduate level, one of the requirements for promotion to associate professor. Also, it appears from her testimony that she was not certified by the appropriate specialty board. Although certification is not required for promotion, it is strongly recommended. Hence, the district court's conclusion that Hart did not prove a prima facie case of sex discrimination because she was not qualified for promotion is supported by the evidence.

Even if Hart had been able to make a prima faacie showing that she was qualified for promotion, the defendants introduced sufficient evidence to rebut Hart's claim of discrimination. Dr. Freireich testified that Hart's qualifications were weak in several major areas. He explained that Hart's publication record in peer reviewed journals was too low to justify

promotion, that her patient care responsibilities had begun to diminish, and that her graduate level teaching experience was insufficient. He also stated that Hart's research program was only part of a larger funded project and that she had never successfully competed for independent research grant funding. While Dr. Freireich admitted that he had three times recommended Hart for promotion, he stated that he had done so reluctantly because he did not wish to stand in the way of her career.

CONSTRUCTIVE DISCHARGE

Hart claims that by taking away her research program and offering her a terminal year contract, M.D. Anderson constructively discharged her from her position as assistant professor. "Constructive discharge will be found where an employer has made working

conditions so difficult that a reasonable person would feel forced to resign." Meyer v. Brown & Root Constr. Co., 661 F.2d 369, 372 (5th Cir. 1981). The district court did not make any specific findings of fact on this issue. However, even if we assume that Hart was constructively discharged from her position, there is no evidence to show that the discharge was discriminatory. Hart admitted at oral argument that it was M.D. Anderson's policy to terminate a professor who had not moved from assistant to associate after a certain number of years. In addition, the appellees introduced evidence that Hart's work performance had significantly deteriorated after she failed to be promoted and that she was no longer performing satisfactory work.

CONVERSION

Hart claimed that appellees

published at least three articles containing scientific data prepared by her without giving her recognition. She claims that the deposition of her colleague, Dr. Keating, would havesubstantiated her claim, had it been admitted into evidence. The deposition was properly excluded however, since no allegation was made that the witness was unavailable. See Fed. R. Civ. P. 323. Moreover, Dr. Freireich, one of the authors of the contested publications, flatly refuted Hart's allegation. He testified that he was the sole author of the publication and that he did not use Hart's research. Hart also claims that M.D. Anderson deprived her of her property without due process by taking away her research program. She claims that she had a property right in the program because of the time and effort she had invested in it. There is no evidence of misuse of her work. the

findings of the district court are supported by the evidence.

SLANDER

Hart's claim that she was unable to obtain other employment because appellees gave her false and malicious employment references is also unsubstantiated. Reference was made at the trial to a letter received by Hart's attorney in which M.D. Anderson's vice president, Dr. Hickey, allegedly stated that he would have to inform prospective employers of the pending discrimination suit. However, the letter was not introduced into evidence. Dr. Hichey took the stand and denied that he ever informed prospective employers about the suit. He stated that he had recommended Hart as an acceptable candidate. Under the circumstance, the district court made a reasonable credibility choice which we

will not disturb on appeal.

The decision of the district court is affirmed in all respects.

AFFIRMED.